VIRGINIA LAW REGISTER

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The American Bar Association.

The meeting of the American Bar Association, held in Saratoga the first week in September was a notable one for more reasons than one.

The meeting was largely attended—more than a thousand lawyers being present. The addresses were of the highest order and many valuable suggestions made in regard to legislation, federal and state, but the marked feature of the meeting was the enthusiasm with which the loyalty of the Association was pledged to the government. Hon. Elihu Root, Chairman, offered the following resolution, which was adopted amidst the most tremendous applause and without a dissenting voice.

"The American Bar Association declares its absolute and unqualified loyalty to the government of the United States.

"We are convinced that the future freedom and security of our country depend upon the defeat of the German military power in the present war.

"We urge the most vigorous possible prosecution of the war with all the strength of men, materials and money which the country can supply.

"We stand for the speedy dispatch of the American Army, however raised, to the battlefront in Europe, where the armed enemies of our country can be found and fought and where our own territory can be best defended.

"We condemn all attempts in Congress and out of it to hinder and embarrass the government of the United States in carrying on the war with vigor and effectiveness.

"Under whatever cover of pacificism or technicality such attempts are made, we deem them to be in spirit pro-German and in effect giving aid and comfort to the enemy.

"We declare the foregoing to be overwhelmingly the sentiment of the American Bar."

A paper was read by Senator Hardwick of Georgia on the Federal Child Labour Law, which becomes interesting in view of the decision of Judge Boyd of North Carolina, which is the

subject of a later editorial. We are not admirers of Senator Hardwick and trust that the State of Georgia may fill his place with a more loyal American citizen, but his address is worthy of perusal and is an able argument against the constitutionality of the Act.

"If it be within the power of Congress," said he, "to pass the child labor legislation, why is it not within its power to legislate so as to deny the privileges of interstate commerce to legitimate and wholesale commodities because they were produced by the labor of women? Or because produced by union labor and non-union labor?"

The fact is that this very simple and plain clause in the Federal Constitution, if the Supreme Court sustains the present Act, can be made a most powerful means to absolutely destroy local self government and entirely blot out what little is left of the rights of the States.

Ex-Senator Sutherland of Utah, the President of the Association, delivered a timely and excellent address on the over-regulation by the government of business and individuals.

> "Under our form of government the will of the people is supreme," he said, "we seem to have become intoxicated with plentitude of our power, or fearful that it will disappear if we do not constantly use it, and, inasmuch as our will can be exercised authoritatively only through some form of law, whenever we become dissatisfied with anything we enact a statute on the subject.
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> "If, therefore, I were asked to name the characteristic which more than any other distinguishes our present-day political institutions, I am not sure that I should not answer, 'the passion for making laws.' There are forty-eight small or moderate-sized legislative bodies in the United States engaged a good deal of the time, and one very large national legislature working overtime at this amiable occupation, their combined output being not far from 15,000 statutes each year. The prevailing obsession seems to be that statutes, like the crops, enrich the country in proportion to their volume. Unfortunately for this notion, however, the average legislator does not always know what he is sowing and the harvest which frequently results is made up of strange and unexpected plants whose appearance is as astonishing to the legislator as it is disconcerting to his constituents.
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> "Criticising the growing extension of arbitrary regulatory powers to commissions, Mr. Sutherland earned pro-

longed applause when he said, 'not only are the business activities of the country being investigated, supervised, directed, and controlled in such a multitude of ways that the banker, the merchant, and the men of industry generally are afloat upon a sea of uncertainty where if they succeed in avoiding the mines of dubious statutes by which they are surrounded, they are in danger of being blown up by an administrative torpedo launched from one of the numerous submarine commissions by which the business waters are everywhere infested, but the government is invading and is threatening to more seriously invade the market-place itself, not as a regulator, but as a participant and competitor. We seem to be approaching more and more nearly the point where the old philosophy that whatever can be done by the individual should not be done by the government even though it may be well done, is to be abandoned for the new and dangerous doctrine that whatever can be done by the government, even though it may be badly done, should not be permitted to the individual."

As might have been expected "The War" was the subject of much talk and Judge Hughes' paper on the "War Power under the Constitution" was almost an echo of the prevailing sentiments.

Fortunately, lawyers—as technical as they are accused of being and doubtless often are—recognize the fact that in time of war the safety of the state against an armed foe requires a strong arm and a far-seeing eye, and that the letter—which often kills—must not be allowed to kill the state, when the spirit can be secured. No war-time measure can ever establish a precedent except when a state of war exists. That there is danger in the law's silence even when arms are clashing, there can be no doubt, but better a momentary hush than the perpetual stillness which may come when the iron heel of a conquerer is upon the Nation's neck.

The Federal Child Labor Law.

No person can fail to approve every legitimate effort to improve the health, morals and physical, mental and spiritual condition of the children of America. Nor do we imagine there are many people who object to a proper child labor law. Any law prohibiting the working of children under

fourteen years of age in a mill, factory, workshop or cannery is a good law if passed by proper authority. But that a right to pass such a law was ever granted to the federal government seems to us to be inconceivable. No one—even the most advanced and rabid nationalist—would seriously argue that the Congress could enact a law saying that no child under fourteen years of age should be allowed to work in a factory, etc. And yet Congress has practically done this by providing the vehicles of Interstate Commerce shall be closed to any and all articles manufactured in any factory, workshop, etc., in which such child labor is employed. What a pity that the dull, stupid Congresses of ante-bellum days had not foreseen the immense possibilities contained in that harmless "Commerce Clause." The Civil War might have been prevented and slavery abolished in such an easy way. Bleeding Kansas might have never bled, and Missouri and other compromises been never even dreamed of. For all Congress had to do was to pass a law prohibiting the transportation of any goods, wares, merchandise or material manufactured or grown by the use of slave labor, and if the Supreme Court had sustained this law, slavery would have ended. If not constitutional then, why now? And yet, can any man say that such a law would have been sustained by any court, even with Story on the bench?

Judge Boyd of the United States Court for the Western District of North Carolina, has declared the Federal Child Labor Law unconstitutional, and in a clear and well considered opinion gives, it seems to us, an unanswerable argument against the validity of the law.

> "The case came before the court in injunction proceedings brought in the name of Roland H. Dagenhart and his minor sons, Reuben and John, of Charlotte, who sought to restrain a Charlotte cotton mill company from discharging the two boys.
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> "In announcing his decision Judge Boyd said he was gratified by the candor of Professor Thomas I. Parkinson of Columbia University, representing the Department of Justice, who asserted that Congress had used its power over interstate commerce for the object of regulation of local conditions within the state and the discouragement of child labor. This admission, said the Judge, left the issue clear

and brought forward the question: 'Can Congress do by indirection that which it undoubtedly can not do directly?'

"Congress," he said, 'can regulate trade among the States, but not the internal conditions of labor.'

"Judge Boyd expressed his approval of laws tending to elevate the condition and moral state of all the people, and made it clear that his judgment on the act was based upon his interpretation of the constitutional limtatons of congressional power.

"After a preliminary recital of the facts, the Court, setting forth its opinion that the act 'is unconstitutional and without the power of Congress to enact,' enjoins the milling company from discharging or curtailing the hours of labor of the minor plaintiffs, and decrees:

"That the said William C. Hammer, United States Attorney, as aforesaid, and his successors, assistants, deputies, and agents, be and they are hereby permanently enjoined from in any way or manner enforcing or attempting to enforce the provisions of the aforesaid act of Congress, or any part thereof, and from instituting or causing to be intuted any prosecution or proceedings under the aforesaid statute, or any of the provisions thereof."

A War Time Will.

In Will Book No. 2, page 271 of the Records of Cumberland County, Va., is found the following quaint letter, which was duly admitted to probate as a will and may not prove uninteresting in these times of war.

To Mr. Jessey Woodson in Bucking County.

North Cailynor,
Caswell County,
March 7th, 1781.

Dear Loving Uncle Jessey:

This comes to inform you that we are all well and in about fifteen miles from our grand army and we are informed that the enemy ar surrounded by our army. we expect to join this grand army by the 10th of this month and I do not no when I shall be back if ever. pray if I never com back sell as much as will pay my depts and the remains I desir shall be given to my sister Polly. and if I never return I bid you all fairwell

for if I dy the hotest hell will be my portion therefore beg a intrust in your prayers and remember my lov unto Mary Anne Price. so no more at present but remaining your loving friend

Josiah Woodson.

That Josiah joined the Grand Army and in a very short while thereafter joined the grander army of the departed, is apparent; for just twenty-one days after the date of this will, on the 28th of March, 1781, the old record in the usual form states that the within last will of Josiah Woodson being proven by the oaths of several parties needless for us to name, "and by the comparison of the handwriting with other papers," was admitted to probate. Jessey Woodson "the executor therein named" with George Carrington, Jr., as his executor, was allowed to qualify. The certificate was signed by George Carrington, Clerk.

One cannot fail to recognize the somewhat pathetic nature of this last communication of this Continental soldier. We trust that Mary Anne Price long remembered his "lov" and somehow or other we cannot help believing that he escaped "the hotest hell" of which he seemed so confident.

Instructions. A Change for the Better.

Within the last year the views of our Supreme Court of Appeals have been very much modified in regard to possible errors made in the giving and refusing of instructions. The REGISTER congratulates itself that the Court seems to have come to the conclusion that the frequent reversal of cases on account of the giving or refusing of instructions could not be justified unless it was apparent that actual injustice had been done.

This Journal has always insisted that this latter view was the correct one. In four cases in which decisions were handed down at Wytheville the Court passed upon questions involving instructions and in each case declined to interfere with the verdict, even though there might have been some question as to the propriety of giving or refusing the instructions in question.

In *The Ferries Co.* v. *Brown,* decided June 14th, 1917, an instruction was given which might have been held to put upon the

defendant the burden of proof of showing that a release was without misrepresentation or fraud, which did not properly belong to the defendant. But the Court held that the instruction not undertaking to deal with the question of the burden of proof and not prejudicing the defendant, could not be allowed to affect the verdict.

In *Eastern Coal &c. Corporation* v. *Beazley, &c.* decided the same day, the Court said:

> "Instructions in a given case are to be read as a whole, and when so read if *it can be seen that they could not have misled the jury,* the verdict will not be disturbed *even though one or more of the instructions may have been defective.* (Italics ours). Defects in one instruction may be cured by a correct statement of the law in another."

Thus following *C. & O. Ry. Co.* v. *McCarthy,* 114 Va. 181, and *Wheaton* v. *Doughty,* 116 Va. p. 566, &c.

In *S. A. L. Ry.* v. *Abernathy,* decided the same day, the Court held that though an instruction couched in the language of one approved by the Court in a reported case contained a more proper and preferable statement of the law as to ordinary case, there was no reversible error in the case at bar.

In *Turner &c.* v. *Rich. & Rap. R. Ry. Co.,* decided the same day the Court held that whilst there might have been an error in one of the instructions it was harmless and therefore could not effect the result.

This ought to be and we believe will in future be the crux of all cases in which instructions are the subject of complaint. Did the giving or refusal of one or more instructions work an apparent injustice or plainly induce the jury to render an improper verdict? If it did then the case ought to be reversed. If not, it should not be reversed.

Should Not a Negro Take Notice that a Mule Is a Dangerous Animal?

Our Supreme Court says "nay" to this question, in the case last mentioned in the above editorial and so one more tradition of the "grander days of the Fathers" disappears from the joke-smith's note-book. We had always been of the "unjudicial" opinion that a "nigger" knew more about the habits and "general cussedness" of a mule than all the rest of the world put together. In a case in Missouri—the greatest mule breeding State in the world—the Court in *Stutzke* v. *Consumers Ice, etc., Co.,* 156 Mo. App. 1, expresses some doubt as to whether the mule is not presumed to be dangerous or "apt to kick," and held that when a man furnished a mule with which to work, it was lack of ordinary care to furnish one "more dangerous than the usual run of mules." Our Court, however, seems to have no such doubt, and indeed from the facts of the case the mule in the present instance must have been of an unusually dangerous and vicious disposition, and whilst this was known to the defendant, the boy who was injured by the mule had never been informed that the mule was in any particular way dangerous. It is quite surprising to find how many cases have gone up to the Supreme Court of more than one State, with the mule as the exciting cause.

Return of an Officer upon an Execution after the Return Day.

In the case of *Moorman* v. *Board of Supervisors, etc.,* decided at the June Term, 1917, the Court decides that the return of an execution two days after the return day is within a reasonable time and being made in lawful performance of a delayed duty, is valid and sufficient to extend the limitation upon the judgment to twenty years from the return day of the execution. In the opinion in this case, delivered by Judge Prentiss, 5 Virginia Law Register, 672, is cited, the opinion alluding to Dr. Lile's note on Rowe v. Hardy as an illuminating one and quotes it as follows: "Another point of equal importance likewise settled most satisfactorily in the opin-

ion, is that the return of an execution is valid though made after the return day. How long afterwards would doubtless depend upon the peculiar circumstances of the case and especially upon the existence or non-existence of intervening equities of third persons acquired in reliance upon the absence of a return. If justice required it and there were no rights of innocent third persons affected, doubtless there is no specific limit to the time within which a valid return of an execution may be made, even though the sheriff's term of office may have expired in the meanwhile.

Mechanics' Liens, Liability of Owner to Sub-Contractors.

This case is a very interesting one and is clearly a very just and fair interpretation of the Mechanic's Lien Law in regard to the claim of a sub-contractor and is valuable in that it makes clear that a great injustice which has sometimes been attempted under the terms of the Mechanic's Lien Law can no longer be worked in this State. This was a case in which one Buchanan entered into a written agreement with one Nolan whereby the latter agreed to furnish for the former all the material and labor necessary for the erection of a costly residence. After the work was less than half done and after less than half of the total contract price had been paid Nolan failed financially and surrendered the contract and Buchanan thereupon proceeded to complete the work under a clause in the contract allowing him so to do, which clause also provided that the certificate of the architect should be conclusive in regard to expense incurred by the owner for furnishing materials or for finishing the work. Various sub-contractors of Nolan, who had furnished labor and material and to whom Nolan was indebted at the time of his failure and surrender of his contract, filed claims under Section 2477 of the Code of Virginia and giving notice to Buchanan filed suits in equity to enforce their claims. The building had not been completed at the time of these suits and Buchanan filed an original answer with his contract denying any indebtedness whatever to Nolan and averring that it would cost more than the balance of the contract price to finish the work, and

later a supplemental answer exhibiting the certificate of the architect, showing a balance due from the contractor of over $4000.00. The Court, Judge Kelly delivering the opinion, says: "The sub-contractor will generally be as well situated as the owner to determine whether the general contractor is solvent. To do more than our statute has done in relieving the sub-contractor of risk in this respect would be to make the owner of a building the guarantor of all bills incurred thereon by the general contractor. This would unjustly, if not unconstitutionally abridge the right of contract. The statute was designed to protect sub-contractors and creates a liability which would not otherwise exist, but its terms must be met before its benefits can be enjoyed." The case of S. V. R. R. Co. v. Miller, 80 Va. 821 is shown by the Court to have been practically destroyed as to its rulings by the subsequent change in the statute, and as the Court says that all of the methods by which the sub-contractor may secure the payment of the amount due him are dependent upon and limited by the indebtedness of the owner to the general contractor.

It was claimed by counsel for the sub-contractors that the contract between Buchanan and Nolan not being recorded, the subcontractors had no notice and were not bound by its terms, and that the owner, therefore became a trustee for the sub-contractors and should have protected himself by requiring a bond of the general contractor; but the Court quickly disposes of this contention by showing that there was no statute requiring the recordation of such contract and no rule of law making the owner a trustee for sub-contractors in such cases. The Court settles now beyond all question that the certificate of an architect in cases of this character in the absence of either allegation or proof of bad faith on his part, must be accepted as conclusive. This has been the law in Virginia since the decision in *Condon* v. *S. S. R. R. Co.,* 14 Grat. 302, but the Court re-affirms it in clear and unmistakable language. The decision is a valuable one and clears up some very doubtful questions upon the construction of the statute.